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## The Ambiguity of Redesignation: What Is 'Applicable' Under the Clean Air Act?

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# THE AMBIGUITY OF REDESIGNATION: WHAT IS ‘APPLICABLE’ UNDER THE CLEAN AIR ACT?

Andrew Miller

## I. INTRODUCTION

In February 1972, Governor Ronald Reagan submitted the first State Implementation Plan (SIP) to the Environmental Protection Agency (EPA) under the new Clean Air Act (CAA).<sup>1</sup> A SIP is a plan implemented by states using EPA approved strategies and regulations meant to achieve National Ambient Air Quality Standards (NAAQS).<sup>2</sup> The SIP requirement was designed by Congress to be the central component of new federal-state partnership established under the CAA.<sup>3</sup> Once the SIP has satisfied the requirements of the EPA, it is approved and becomes enforceable under state and federal law.<sup>4</sup>

Over the 44 years since the first SIP was submitted to the EPA, states have struggled to meet CAA requirements.<sup>5</sup> When a state fails to meet the ambient air quality standard set by the EPA for a particular pollutant, the state is designated to be in nonattainment.<sup>6</sup> If a state has been designated in nonattainment for a particular pollutant, and subsequently meets the air quality standards and other statutory requirements, it can petition the EPA for a redesignation from nonattainment to attainment.<sup>7</sup> This Note addresses a split between two circuit

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<sup>1</sup> Michael R. Barr, *Introduction to the Clean Air Act: History, Perspective, and Direction for the Future*, in THE CLEAN AIR ACT HANDBOOK 1, 2 (Julie R. Domike & Alec C. Zacaroli, eds., 3d ed. 2011).

<sup>2</sup> ROY S. BELDEN, CLEAN AIR ACT 25 (Julie R. Domike & Alec C. Zacaroli, eds., 2d ed. 2011).

<sup>3</sup> Christopher D. Ahlers, *Origins of the Clean Air Act: A New Interpretation*, 45 ENVTL. L. 75, 119 (2015).

<sup>4</sup> BELDEN, *supra* note 2, at 26.

<sup>5</sup> Barr, *supra* note 1, at 3.

<sup>6</sup> “Non-attainment” will be further explained in Section II. Alec C. Zacaroli, *Meeting Ambient Air Standards: Development of the State Implementation Plans*, in THE CLEAN AIR ACT HANDBOOK 1, 44 (Julie R. Domike & Alec C. Zacaroli eds., 3d ed. 2011).

<sup>7</sup> *Id.* at 45.

courts pertaining to whether or not the statute outlining the requirements for redesignation is ambiguous. The answer will propose how best to determine what is mandatory and what is within the EPA's discretion when approving a redesignation plan.

On July 14, 2015, the Sixth Circuit determined that the provision for redesignation was not ambiguous enough to trigger a *Chevron*<sup>8</sup> level of deference in deciding what components of a SIP are applicable in determining the redesignation of an area from nonattainment to attainment.<sup>9</sup> The Sixth Circuit explicitly stated that their decision departs from the approach taken by the Seventh Circuit.<sup>10</sup> The Seventh Circuit, eleven years earlier, found that "applicable" was without definition in the statute and therefore deference was given to the EPA in their interpretation of the statute.<sup>11</sup>

This Note will analyze the CAA as interpreted by the Sixth and Seventh Circuits, and determine which court correctly determined the ability of the EPA to use its discretion in redesignating an area in nonattainment. Part II will provide background into the CAA, particularly the legislative history of the Act, the requirements of the Act, and definition of key terms used throughout the Act. Part III will survey the two conflicting circuit opinions, the Seventh Circuit and Sixth Circuit, respectively. Part IV will argue that the Sixth Circuit incorrectly applied precedent and wrongly found the redesignation provisions unambiguous. It will further argue why the Seventh Circuit was correct in finding the redesignation portions of the CAA are ambiguous and the EPA's interpretation of these provisions permissible, thus giving them deference under *Chevron*.

## II. CLEAN AIR ACT OVERVIEW

### a. History of the Air Pollution Legislation

The evolution of Congress' legislation intending to control air pollution began with the enactment of Air Pollution Control Act of 1955.<sup>12</sup> The driving forces behind this legislation were local and international air pollution trage-

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<sup>8</sup> *Chevron* will be discussed further in Section IV. For now, it shall suffice to say that *Chevron* grants discretion to agencies in interpreting statutes when 1) intent of Congress is unclear and 2) the agency's interpretation is reasonable. *Chevron v. Nat. Res. Def. Council*, 467 U.S. 837, 843 (1984).

<sup>9</sup> *Sierra Club v. EPA*, 793 F.3d 656, 669 (6th Cir. 2015) (en banc).

<sup>10</sup> *Id.*

<sup>11</sup> *Sierra Club v. EPA*, 375 F.3d 537, 541 (7th Cir. 2004).

<sup>12</sup> BELDEN, *supra* note 2, at 5.

dies.<sup>13</sup> The first of these tragedies occurred in Donora, Pennsylvania in 1948, as the result of air pollution from several U.S. Steel mills.<sup>14</sup> By the time the mills were shut down and the fog lifted, 22 residents had died and nearly half of the 13,000 remaining residents were ill.<sup>15</sup> The second was in 1952, when the United Kingdom experienced 5 days of intense smoke-like pollution which caused the death of over 4,000 people, left many with respiratory problems, disrupted the lives of millions more, and killed livestock.<sup>16</sup> These events alerted the public to the danger of air pollution and prompted many state and federal laws.<sup>17</sup>

The 1955 Act provided funding for federal research programs and authorized the U.S. Surgeon General to provide technical and research assistance to the States.<sup>18</sup> The Clean Air Act of 1963 followed as the first federal legislation designed to control air pollution.<sup>19</sup> This Act created additional research programs and directed the Department of Health, Education, and Welfare (HEW), to take actions to decrease air pollution.<sup>20</sup>

The federal government's first regulation of sources of air pollution came with the 1967 Air Quality Act.<sup>21</sup> For the first time, HEW was tasked with setting national air quality parameters, which the states would use to then set ambient air quality standards.<sup>22</sup> For the first time, states were now required to submit their implementation plans to the federal government as a means of enforcement.<sup>23</sup>

Two key events in 1970 preceded the passage of the 1970 Clean Air Act: the first Earth Day was celebrated and the Environmental Protection Agency (EPA) was created.<sup>24</sup> The goal of the newly created Agency was to bolster the enforcement of federal environmental laws.<sup>25</sup> With the enactment of the 1970

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<sup>13</sup> Ahlers, *supra* note 3, at 78.

<sup>14</sup> Don Hopey & David Templeton, *In 1948, smog left deadly legacy in Donora*, PITTSBURGH POST-GAZETTE (Dec. 12, 2010, 5:00 AM), <http://www.post-gazette.com/news/health/2010/12/12/In-1948-smog-left-deadly-legacy-in-Donora/stories/201012120248>.

<sup>15</sup> *Id.*

<sup>16</sup> *The Great Smog of 1952*, METOFFICE.GOV.UK, <http://www.metoffice.gov.uk/learning/learn-about-the-weather/weather-phenomena/case-studies/great-smog> (last updated Apr. 20, 2015).

<sup>17</sup> EPA, THE PLAIN ENGLISH GUIDE TO THE CLEAN AIR ACT 2 (2007), <https://www.epa.gov/sites/production/files/2015-08/documents/peg.pdf>.

<sup>18</sup> BELDEN, *supra* note 2, at 5.

<sup>19</sup> *Evolution of the Clean Air Act*, EPA.GOV, <http://www.epa.gov/clean-air-act-overview/evolution-clean-air-act> [hereinafter *Evolution*] (last visited Feb. 26, 2016).

<sup>20</sup> BELDEN, *supra* note 2, at 5.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 6.

<sup>23</sup> *Id.*

<sup>24</sup> Ahlers, *supra* note 3, at 117.

<sup>25</sup> *Id.*

Act, Congress granted the EPA the authority to regulate air pollution.<sup>26</sup>

This new Act established a comprehensive federal and state partnership to limit air pollution from stationary and mobile sources.<sup>27</sup> The newly formed EPA would now be responsible for establishing air quality levels acceptable for public health and welfare, called National Ambient Air Quality Standards (NAAQS).<sup>28</sup> In order to achieve these new air quality standards, the EPA would guide each state in developing a plan to reduce air pollution, called a State Implementation Plan.<sup>29</sup>

A major revision of the Clear Air Act occurred in 1977.<sup>30</sup> The primary aim of these amendments was to prevent increased pollution in states that were meeting the air quality standards through the Prevention of Significant Deterioration (PSD), and to place further restrictions on states that had not yet reached the air quality standard for air pollution.<sup>31</sup> The CAA was further amended in 1990 to expand the responsibility and authority of the federal government.<sup>32</sup> These 1990 amendments created new requirements for areas not meeting the ambient air quality standards for certain pollutants; more stringently regulated mobile emissions; created new programs to target acid rain; created a permit system for major stationary sources; and upgraded criminal violations of the statute from misdemeanors to felonies.<sup>33</sup>

#### b. Purpose of the Clear Air Act

On April 22, 1970, the first Earth Day, twenty million people across America held public demonstrations demanding federal action in confronting environmental issues.<sup>34</sup> In responding to these demands, Congress found that a large number of people were moving to expanding metropolitan areas.<sup>35</sup> This urbanization, they found, was harmful to the health and welfare of individuals, as well as to agricultural crops and animals.<sup>36</sup> Thus, the CAA sought to protect the country's air quality for the public health and welfare of the people.<sup>37</sup> Con-

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<sup>26</sup> *Id.* at 118.

<sup>27</sup> *Evolution*, *supra* note 19.

<sup>28</sup> BELDEN, *supra* note 2, at 6.

<sup>29</sup> *Id.*

<sup>30</sup> *Evolution*, *supra* note 19.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> BELDEN, *supra* note 2, at 8-9.

<sup>34</sup> *EPA History: Earth Day*, EPA.GOV, <https://www.epa.gov/aboutepa/epa-history-earth-day> (last visited Aug. 23, 2016).

<sup>35</sup> Clean Air Act, 42 U.S.C. § 7401(a)(1) (2012).

<sup>36</sup> *Id.* at § 7401(a)(2).

<sup>37</sup> *Id.* at § 7401(b)(1).

gress felt it could do this by encouraging a “national research and development program to achieve the prevention and control of air pollution.”<sup>38</sup> In order to do this, Congress sought “to provide technical and financial assistance” to the states in developing and executing “air pollution prevention and control programs.”<sup>39</sup> Its primary goal was to encourage and promote reasonable action among federal, state, and local governments in preventing air pollution.<sup>40</sup>

These are the purposes given by Congress in the Act itself. However, many involved with the passage of the 1970 CAA would argue that its true purpose was to strengthen the enforceability of prior pollution laws.<sup>41</sup> The failure of the states in implementing and enforcing air pollution laws under the prior federal legislation led to a need to elevate enforcement to a national level.<sup>42</sup>

### c. National Ambient Air Quality Standards

There are six listed<sup>43</sup> criteria<sup>44</sup> pollutants for which the EPA sets National Ambient Air Quality Standards: “sulfur dioxide (SO<sub>2</sub>), particulate matter (PM), nitrogen oxide (NO<sub>x</sub>), carbon monoxide (CO), ozone (O<sub>3</sub>) and lead (Pb).”<sup>45</sup> For each of these pollutants, the EPA sets both primary NAAQS, the levels that “are requisite to protect the public health”<sup>46</sup> and secondary NAAQS, the level that “is requisite to protect the public welfare.”<sup>47</sup> Once the EPA promulgates the NAAQS, it is the responsibility of the states to achieve these standards for each pollutant within their Air Quality Control Regions (AQCRs).<sup>48</sup> An AQCR

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<sup>38</sup> *Id.* at § 7401(b)(2).

<sup>39</sup> *Id.* at § 7401(b)(3).

<sup>40</sup> *Id.* at § 7401(c).

<sup>41</sup> Paul G. Rogers, *The Clean Air Act of 1970*, 16 EPA J. 21, 22 (1990).

<sup>42</sup> *Id.* (stating one of the reasons the 1967 Air Quality Act failed and thus spurred Congress to enact a tough national air quality program in 1970 was the almost complete lack of enforcement of the earlier statute).

<sup>43</sup> BELDEN, *supra* note 2, at 16 (“Courts have recognized that EPA has a mandatory duty to list a substance if the agency determines that (1) the substance is an air pollutant, (2) the pollutant is emitted by numerous or diverse sources, and (3) the pollutant’s presence in the atmosphere may reasonably be anticipated to endanger public health or welfare.”).

<sup>44</sup> Richard E. Ayres & Jessica L. Olson, *Setting National Ambient Air Quality Standards*, in *THE CLEAN AIR ACT HANDBOOK 1*, at 13, 15 (Julie R. Domike & Alec C. Zaccaroli eds., 2011) (stating that within 12 months of listing a substance as an air pollutant, the EPA must publish air quality “criteria” that reflects the latest scientific information helpful in determining the kind and extent of the effect the pollutant will have on public health and welfare by its presence in the air).

<sup>45</sup> *Id.* at 13; *See generally* National Primary and Secondary Ambient Air Quality Standards, 40 C.F.R. § 50.4-50.18 (2006) (referencing the pollutants that are being regulated and how).

<sup>46</sup> Clean Air Act, 42 U.S.C. § 7409(b)(1) (2012).

<sup>47</sup> *Id.* at § 7409(b)(2).

<sup>48</sup> Zaccaroli, *supra* note 6, at 43.

is established in three ways: (1) under the Air Quality Act of 1967; (2) the EPA, working with the state and local governments, may create any interstate or major intrastate area as an AQCR; and (3) any portion of the state not already under an AQCR can be established as an AQCR.<sup>49</sup>

#### d. State Implementation Plan

The SIP is the mechanism by which state and federal government enforce the NAAQS requirements.<sup>50</sup> The SIP must “include enforceable emissions limitations and other control measures (including economic incentives such as fees, marketable permits, and auctions of emissions rights)” and their timeline for compliance.<sup>51</sup> The SIP must “provide for establishment . . . appropriate devices, methods, systems and procedures necessary to monitor, compile, and analyze” air quality data.<sup>52</sup> Also, the SIP regulates any modifications to and construction of stationary sources within its jurisdiction.<sup>53</sup> Further, the SIP must also contain adequate provisions to prevent significant contribution to nonattainment for the NAAQS and prevent significant deterioration of the air quality or protect visibility.<sup>54</sup> Lastly, the SIP must assure the EPA that it will have adequate personnel, laws, and funding to enforce the requirements in its implementation plan.<sup>55</sup>

#### e. Attainment and Nonattainment

Each AQCR will be designated either in attainment, nonattainment, or unclassifiable for each pollutant.<sup>56</sup> An AQCR is in attainment for a particular pollutant when it meets the primary or secondary NAAQS for that pollutant.<sup>57</sup> Nonattainment is given for AQCR if a pollutant exceeds the primary or secondary NAAQS.<sup>58</sup> An “area that cannot be classified on the basis of available information” is designated unclassifiable.<sup>59</sup>

An area designated as in attainment or unclassifiable must take measures to “prevent significant deterioration of air quality.”<sup>60</sup> The Prevention of Signifi-

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<sup>49</sup> *Id.*

<sup>50</sup> BELDEN, *supra* note 2, at 25-26.

<sup>51</sup> 42 U.S.C. § 7410(a)(2)(A) (2012).

<sup>52</sup> *Id.* at § 7410 (a)(2)(B)(i).

<sup>53</sup> *Id.* at § 7410 (a)(2)(C).

<sup>54</sup> *Id.* at § 7410 (a)(2)(D)(i)-(ii).

<sup>55</sup> *Id.* at § 7410 (a)(2)(E).

<sup>56</sup> 42 U.S.C. § 7407(d)(1)(A)(i)-(iii) (2012).

<sup>57</sup> *Id.* at § 7407(d)(1)(A)(ii).

<sup>58</sup> *Id.* at § 7407(d)(1)(A)(i).

<sup>59</sup> *Id.* at § 7407(d)(1)(A)(iii).

<sup>60</sup> 42 U.S.C. § 7471 (2012).

cant Deterioration (PSD) programs are designed to ensure that areas that are meeting the NAAQS (in attainment) do not further degrade their air quality.<sup>61</sup> Areas not achieving the NAAQS, designated as in nonattainment, are required to implement control measures within their SIPs to achieve the NAAQS.<sup>62</sup>

f. Redesignation

An AQCR may be redesignated from nonattainment to attainment either by the EPA Administrator due to “available information indicat[ing]” redesignation is warranted, or by a petition from the state governor seeking redesignation.<sup>63</sup> Any redesignation from nonattainment to attainment must satisfy the following criteria: (1) the area has achieved the NAAQS,<sup>64</sup> (2) the EPA has fully approved the implementation plan,<sup>65</sup> (3) the EPA has determined that the “the improvement in air quality is due to permanent and enforceable reductions in emissions” as a result of the SIP and federal air control regulation,<sup>66</sup> and (4) the EPA has approved the maintenance plan for the AQCR.<sup>67</sup>

g. Reasonably Available Control Technology

If an area is in nonattainment of the NAAQS, it is required to provide for the “implementation of all reasonably available control measures as expeditiously as practicable (including such reductions in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology).”<sup>68</sup> The CAA does not give a definition for reasonably available control technology (RACT).<sup>69</sup> However, the EPA has defined it as the “lowest emission limitation” that an individual source can accomplish through control technology that is “reasonably available considering technological and economic feasibility.”<sup>70</sup> To assist the states in determining appropriate RACT requirements, the EPA issues Control Technique Guidelines (CTGs). While not binding on the States, CTG serves as a good indicator of what the EPA considers a fulfillment of the RACT requirement.<sup>71</sup>

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<sup>61</sup> BELDEN, *supra* note 2, at 53.

<sup>62</sup> Zacaroli, *supra* note 6, at 49.

<sup>63</sup> *Id.* at 45.

<sup>64</sup> 42 U.S.C. § 7407(d)(3)(E)(i).

<sup>65</sup> *Id.* at § 7407(d)(3)(E)(ii).

<sup>66</sup> *Id.* at § 7407(d)(3)(E)(iii).

<sup>67</sup> *Id.* at § 7407(d)(3)(E)(iv).

<sup>68</sup> 42 U.S.C. § 7502(c)(1) (2012).

<sup>69</sup> Zacaroli, *supra* note 6, at 49.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 50.



## III. BACKGROUND ON CIRCUIT SPLITS

a. Seventh Circuit's *Sierra Club v. EPA*

After the 1990 amendments to the Clean Air Act, which lowered the level of acceptable ozone pollution in the NAAQS requirements, the St. Louis Metropolitan area was determined to be in moderate<sup>72</sup> nonattainment. By not complying with the November 15, 1996, deadline for attainment, the AQCR was to be automatically reclassified as a serious nonattainment area.<sup>74</sup> Then, the EPA decided that the AQCR had made enough progress before the deadline that they would suspend the "serious" nonattainment status.<sup>75</sup> The Sierra Club challenged this decision, and the court agreed, that the St. Louis Metropolitan area should be classified as a serious nonattainment area.<sup>76</sup> The new deadline for the SIP containing the new requirements under the area's new classification as "serious" nonattainment was January 30, 2004.<sup>77</sup> In 2002, before this deadline, St. Louis Metropolitan area met the ozone NAAQS.<sup>78</sup>

Having met the standards, the states making up the St. Louis Metropolitan area sought a redesignation of their AQCR as being in attainment.<sup>79</sup> When redesignating an AQCR from nonattainment to attainment, the EPA must do the following:

- (i) the Administrator determines that the area has attained the national ambient air quality standard;
- (ii) the Administrator has fully approved the applicable implementation plan for the area under section 7410(k) of this title;
- (iii) the Administrator determines that the improvement in air quality is due to permanent and enforceable reductions in emissions resulting from implementation of the applicable implementation plan and applicable Federal air pollutant control regulations and other permanent and enforceable reductions;
- (iv) the Administrator has fully approved a maintenance plan for the area as meeting the requirements of section 7505a of this title; and
- (v) the State containing such area has met all requirements applicable to the area

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<sup>72</sup> In 1990, Congress amended the requirements for AQCRs that are in nonattainment for Ozone pollution. It created five classifications for areas of nonattainment: marginal, moderate, serious, severe and extreme. Each classification had its own requirements as well as the requirements of the lower classes. BELDEN, *supra* note 2, at 35-36.

<sup>73</sup> *Sierra Club*, 311 F.3d 853, 856 (7th Cir. 2002).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 855.

<sup>76</sup> *Id.* at 862.

<sup>77</sup> Brief for Respondent at 15, *Sierra Club v. EPA*, 375 F.3d 537 (2004) (Nos. 03-2839 and 03-3329).

<sup>78</sup> *Sierra Club*, 375 F.3d at 538.

<sup>79</sup> *Id.*

under section 7410 of this title and part D of this subchapter.<sup>80</sup>

The EPA determined the St. Louis Metropolitan area had met all five of these requirements and redesignated the area as in attainment.<sup>81</sup> The Sierra Club challenged the EPA's decision under requirements (ii) and (iv), alleging that the St. Louis area did not have proper "applicable implementation plan" and "maintenance plan."<sup>82</sup> The court's decision as to requirement (iv) will not be discussed further.<sup>83</sup>

The dispute regarding requirement (ii) was over what kind of implementation plan is "applicable."<sup>84</sup> According to the Sierra Club, the "applicable" plan should be the pre-attainment plan.<sup>85</sup> The Sierra Club contended that Congress intended for the SIP of a nonattainment area to have met all of the SIP requirements for a serious nonattainment area, before redesignation should be allowed.<sup>86</sup> In its view, Congress wanted to prevent states from using redesignation as a way to avoid control measures (RACT/RACM) placed on nonattainment areas.<sup>87</sup> Furthermore, the Sierra Club did not find the word "applicable" to be ambiguous due to its use in other parts of the Clean Air Act.<sup>88</sup>

The EPA alleged that the requirement (ii) is ambiguous, and thus, under the Supreme Court's *Chevron* decision, meant the EPA has deference in interpreting which plan is "applicable."<sup>89</sup> The EPA decided that the SIP St. Louis was implementing at the time the redesignation request was submitted was an appropriate "applicable implementation plan."<sup>90</sup> The EPA argued it would be unreasonable to require states to comply with stricter standards than the requirements it used to come within compliance of the NAAQS.<sup>91</sup> Furthermore, they

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<sup>80</sup> 42 U.S.C. § 7407(d)(3)(E) (2012).

<sup>81</sup> *Sierra Club*, 375 F.3d at 539 (citing Determination of Attainment of Ozone Standard, St. Louis Area; Approval and Promulgation of Implementation Plans, and Redesignation of Areas for Air Quality Planning Purposes, State of Missouri, 68 Fed. Reg. 25418 (May 12, 2003) (codified at 40 C.F.R. pts. 52 and 81) and Approval and Promulgation of Implementation Plans, and Designation of Areas for Air Quality Purposes, State of Illinois, 68 Fed. Reg. 25442 (May 12, 2003) (codified at 40 C.F.R. pts. 52 and 81)).

<sup>82</sup> *Sierra Club*, 375 F.3d at 539.

<sup>83</sup> While §7407(d)(3)(E)(iv) was an area of contention in the Seventh Circuit case, it is not a portion of the statute under review in the Sixth Circuit case. Since there is not a disagreement among the two circuits pertaining to (iv), the Seventh Circuit's decision as to (iv) will be omitted from this discussion.

<sup>84</sup> *Sierra Club*, 375 F.3d at 540.

<sup>85</sup> *Id.*

<sup>86</sup> Brief for Petitioner at 10, *Sierra Club v. EPA*, 375 F.3d 537 (7th Cir. 2004) (Nos. 03-2839 and 03-3329).

<sup>87</sup> *Id.* at 12.

<sup>88</sup> *Sierra Club*, 375 F.3d at 541.

<sup>89</sup> Brief for Respondent at 23-24, *Sierra Club v. EPA*, 375 F.3d 537 (7th Cir. 2004) (Nos. 03-2839 and 03-3329).

<sup>90</sup> *Id.* at 26-27.

<sup>91</sup> *Id.* at 28.

claimed that delaying redesignation while waiting for a future SIP (the SIP that would require approval under serious nonattainment), would “unduly impede or prolong” the process without any added benefit.<sup>92</sup>

The Seventh Circuit boils the question down to whether St. Louis, having their status automatically raised to serious nonattainment, must use RACM associated with serious nonattainment.<sup>93</sup> The court summarizes the EPA’s argument finding that “the ‘applicable’ plan requires an area to continue doing whatever worked, and nothing more.”<sup>94</sup> In contrast, they summarized the Sierra Club’s interpretation of an “applicable” plan to mean “‘whatever should have been in the plan at the time of attainment’ rather than ‘whatever actually was in the plan and already implemented or due at the time of attainment.’”<sup>95</sup>

The court found both interpretations as “conceivable understandings of the law.”<sup>96</sup> Given this finding, the court held *Chevron*<sup>97</sup> gives deference to the EPA’s interpretation of the statute.<sup>98</sup> The court noted that if Congress had a rigid definition of “applicable” they could have easily drafted it that way.<sup>99</sup> They rejected the Sierra Club’s claim that the court should look to other parts of the CAA for the use of “applicable” because the word “takes color from context; it lacks a single, enduring meaning.”<sup>100</sup> Lastly, the court found the Sierra Club’s interpretation, which would have required businesses to undertake costly measures despite having achieved NAAQS through approved means, resulted in no payoff for compliance.<sup>101</sup>

#### b. Sixth Circuit’s *Sierra Club v. EPA*

In 2005, the EPA designated the Cincinnati-Hamilton area as in nonattainment for fine particulate matter (PM<sub>2.5</sub>).<sup>102</sup> In 2011, the EPA approved the peti-

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<sup>92</sup> *Id.* at 29.

<sup>93</sup> *Sierra Club*, 375 F.3d at 540.

<sup>94</sup> *Id.* at 540-41.

<sup>95</sup> *Id.* at 541.

<sup>96</sup> *Id.*

<sup>97</sup> *Chevron*, 467 U.S. at 843 (“if the statute is silent or ambiguous with respect to the specific issue, the question before the court is whether the agency’s answer is based on a permissible construction of the statute.”).

<sup>98</sup> *Sierra Club*, 375 F.3d at 541.

<sup>99</sup> *Id.* (giving an example of clear phraseology, “the Administrator has determined that the area will continue to abide by the implementation plan that was, or should have been, in place?”).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> Brief for Respondent at 20, *Sierra Club v. EPA*, 793 F.3d 656 (6th Cir. 2015) (Nos. 12-3169, 12-3182, 12-3420); *see also* 40 C.F.R. § 81.336 (2016) (this regulation contains designated areas for the State of Ohio).

tion of Ohio, Indiana, and Kentucky for redesignation of the Cincinnati-Hamilton area from nonattainment to attainment for PM<sub>2.5</sub>.<sup>103</sup> Cincinnati-Hamilton met the NAAQS in large part to implementation of a regional cap-and-trade program that reduced interstate pollution.<sup>104</sup> The EPA granted their request even though the states' agencies had not implemented RACT control measures that were applicable to nonattainment areas.<sup>105</sup> The Sierra Club brought suit against the EPA, alleging that the EPA acted illegally in approving the SIPs without RACT measures and in redesignating the area as in attainment.<sup>106</sup>

The Sierra Club challenged the EPA's decision based on §§ 7407(d)(3)(E)(ii)-(iii) for redesignation,<sup>107</sup> mentioned in the previous case.<sup>108</sup> The Sierra Club argued that the EPA failed to satisfy §7407(d)(3)(E)(ii) by approving the SIPs without RACT/RACM provisions.<sup>109</sup> They contended, that under § 7502(c)(1), all SIPs for nonattainment areas "shall provide for the implementation of all reasonably available control measures [RACM] as expeditiously as practicable (including such reductions in emissions from existing sources in the area as may be obtained through the adoption, at a minimum of reasonably available control technology [RACT]) . . .".<sup>110</sup>

The EPA argued the provisions to mandate the RACM/RACT measures only apply if they are needed to attain the NAAQS for PM<sub>2.5</sub>.<sup>111</sup> They stated that "applicable implementation plan" in § 7407(d)(3)(E)(ii) does not unambiguously refer to the pre-attainment plan.<sup>112</sup> Furthermore, the "fully approve[d]" component of § 7407(d)(3)(E)(ii) applies only to the parts of the SIP that were necessary for reaching the NAAQS levels and not all statutory provisions required within nonattainment areas.<sup>113</sup>

The court found Congress's language unambiguously mandates the implementation of RACT/RACM in SIPs.<sup>114</sup> They cite "shall provide" language in § 7502(c)(1), as evidence that Congress unambiguously requires RACT/RACM.<sup>115</sup> If the state has not implemented RACT/RACM, the EPA

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<sup>103</sup> Sierra Club, 793 F.3d at 660-61.

<sup>104</sup> *Id.* at 659.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 661.

<sup>108</sup> *Id.* at 665. As with the Seventh Circuit case, the court's decision as to requirement (iii) will not be discussed further as there is no dispute between the two circuits pertaining to §7407(d)(3)(E)(iii).

<sup>109</sup> *Id.* at 661.

<sup>110</sup> *Id.* at 668.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 669.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 670.

<sup>115</sup> *Id.* at 669.

cannot approve its SIP and redesignation is not permissible.<sup>116</sup> Furthermore, the court “respectfully disagree[d] with the Seventh Circuit that ‘applicable implementation plan’ is sufficiently vague to trigger *Chevron* deference.”<sup>117</sup> In doing so, they rejected the EPA’s interpretation of requiring RACT only if necessary for attainment.<sup>118</sup>

#### IV. ANALYSIS

The crux of the disagreement between the Seventh and Sixth Circuit comes down to whether or not the word “applicable” as used in §7407(d)(3)(E) is ambiguous enough to trigger *Chevron* deference.<sup>119</sup> The cornerstone of the Sixth Circuit’s argument is a reliance on *Wall v. EPA*.<sup>120</sup> A thorough examination of its use of *Wall* is helpful in understanding why the Sixth Circuit was wrong in concluding that §7407(d)(3)(E)(ii) unambiguously requires RACT in a SIP of an area that has achieved NAAQS to be “applicable.”<sup>121</sup> The Seventh Circuit was correct in determining that “applicable” as found in §7407(d)(3)(E)(ii) was sufficiently ambiguous enough to trigger *Chevron* level of analysis.

##### a. Sixth Circuit’s Rationale

As stated above, the Sixth Circuit, in reaching their decision, relied upon their previous decision in *Wall v. EPA*. In *Wall*, a case dealing with the redesignation of Cincinnati from nonattainment to attainment for ozone pollution,<sup>122</sup> the Sixth Circuit found that “applicable” under §7407(d)(3)(E)(v) was ambiguous.<sup>123</sup> §7407(d)(3)(E)(v) states: “the State containing such area has met all requirements applicable to the area under Section 7410 of this title and part D of this subchapter.”<sup>124</sup> Part D that is referred to in this provision is broken up into Subparts. The Subpart in question in *Wall* was Subpart 2, which pertains

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<sup>116</sup> *Id.* at 670.

<sup>117</sup> *Id.* at 669.

<sup>118</sup> *Id.*

<sup>119</sup> *Sierra Club*, 375 F.3d at 541; *Sierra Club*, 793 F.3d at 669.

<sup>120</sup> *Wall v. EPA*, 265 F.3d 426, 442 (6th Cir. 2001) (concluding that the EPA had discretion as to portions of (v) except in the use of RACT in a SIP for moderate ozone pollution); *See Sierra Club*, 793 F.3d at 669 (The plaintiff in this case relied on the opinion first outlined in *Wall v. EPA*).

<sup>121</sup> *Sierra Club*, 793 F.3d at 669.

<sup>122</sup> *Wall*, 265 F.3d at 432.

<sup>123</sup> *Id.* at 439 (“Although ‘applicable’ could be interpreted as limiting only the geographical area to which the statutory requirements must apply, it can also be interpreted as limiting the number of actual requirements within CAA § 110 and part D that apply to a given area.”).

<sup>124</sup> 42 U.S.C. § 7407(d)(3)(E)(v).

to “Additional Provisions for Ozone Nonattainment Areas.”<sup>125</sup> The court in *Wall* decided to defer to the EPA on the portions of part D that Congress did not give clear requirements and make mandatory portions with clear congressional intent.<sup>126</sup>

The court found the portions of part D pertaining to a transportation-conformity requirement<sup>127</sup> were sufficiently ambiguous in regards to their applicability for redesignation requests.<sup>128</sup> There was, however, a portion of part D that Congress did unambiguously require of the SIP: the implementation of RACT for ozone pollution.<sup>129</sup> Subpart 1 of part D pertains to nonattainment areas in general and Subpart 2 pertains to “Additional Provisions for Ozone Nonattainment Areas.”<sup>130</sup> Subpart 2 provides that “[t]he State shall submit a revision to the applicable implementation plan to include provisions to require the implementation of reasonably available control technology.”<sup>131</sup> To the court, this portion of part D is a clear indicator that Congress wanted RACT to be a required portion of the applicable SIP for ozone pollution.<sup>132</sup>

The pollutant at issue in the Sixth Circuit’s *Sierra Club* was particulate matter (PM<sub>2.5</sub>).<sup>133</sup> PM<sub>2.5</sub> is not subject to Subpart 2 of part D, but falls under the requirements listed in Subpart 1 of part D.<sup>134</sup> However, the Sixth Circuit found that the clear congressional intent that *Wall* found in Subpart 2, can also be found in Subpart 1 as it pertains to PM<sub>2.5</sub>.<sup>135</sup> Their rationale was the “statutory language at issue in that case is functionally identical to” the language of Subpart 2.<sup>136</sup> Therefore, the Court comes to the conclusion that since *Wall* unambiguously requires RACT in a SIP seeking redesignation under Subpart 2 for ozone pollution, RACT is unambiguously required for particulate matter redesignation as well.<sup>137</sup>

The redesignation statute in question in *Wall* was §7407(d)(3)(E)(v),<sup>138</sup> while

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<sup>125</sup> 42 U.S.C. Ch. 85, Subch. I, Pt. D, Subpt. 2.

<sup>126</sup> *Wall*, 265 F.3d at 440.

<sup>127</sup> These conformity requirements prohibit a federal agency from providing financial assistance to activities that do not conform to the applicable SIP requirements. For example, in ozone non-attainment area, the state is required to implement vehicle inspection programs. BELDEN, *supra* note 2, at 157-58.

<sup>128</sup> *Wall*, 265 F.3d at 440.

<sup>129</sup> *Id.*

<sup>130</sup> 42 U.S.C. Ch. 85, Subch. I, Pt. D, Subpt. 1 and 2.

<sup>131</sup> 42 U.S.C. § 7511a(b)(2) (2012).

<sup>132</sup> *Wall*, 265 F.3d 426 at 440.

<sup>133</sup> *Sierra Club*, 793 F.3d at 660.

<sup>134</sup> 42 U.S.C. § 7502.

<sup>135</sup> *Sierra Club*, 793 F.3d at 669.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Wall*, 265 F.3d at 438. *See* 42 U.S.C. §7407(d)(3)(E)(v) (the State containing such area has met all requirements applicable to the area under section 7410 of this title and part D of this subchapter).

the redesignation statute in *Sierra Club* was §7407(d)(3)(E)(ii).<sup>139</sup> However, the court reads them as essentially synonymous in saying:

Again, we held in [*Wall*] that the Act unambiguously requires RACT in the area's SIP as a prerequisite to redesignation despite use of the phrase "applicable implementation plan" in the ozone RACT provision. Clearly, we did not read this phrase as an implicit delegation to the EPA to require ozone RACT only if necessary to attainment, and we do not now read that phrase in §7407(d)(3)(E)(ii) as a similar delegation with respect to the general RACM/RACR provisions for all types of emission.<sup>140</sup>

In rejecting any deference to the EPA under §7407(d)(3)(E)(ii), the court cites the teaching under *Wall* as to §7407(d)(3)(E)(v).<sup>141</sup> They claim that the "type of language"<sup>142</sup> under review in *Sierra Club* is the same as in *Wall* and that "type of language" unambiguously requires RACM/RACR to be implemented prior to redesignation.<sup>143</sup> This summarizes the extent of the rationale used by the Sixth Circuit in determining that there is an unambiguous requirement for RACT implementation within SIP before redesignation can be approved.

#### b. Why the Sixth Circuit Misapplied *Wall*

In a dissent, Justice Brandeis once stated "[s]tare decisis is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right."<sup>144</sup> While the Sixth Circuit's reliance on the past statutory interpretation in *Wall* is admirable for consistency reasons, the court rigidly applies the statutory interpretation in *Wall* to the statutes at issue in *Sierra Club*. Statutory interpretation is not to be a mechanical exercise in which a court applies a set of inflexible rules.<sup>145</sup>

That is exactly what the Sixth Circuit has done in *Sierra Club*. By relying on past statutory interpretation, it has rigidly applied a rule under one provision to a completely different provision. In order to understand why the interpretation of the rule in *Wall* should not be applied to the redesignation provisions in *Si-*

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<sup>139</sup> *Sierra Club*, 793 F.3d 668. See 42 U.S.C. §7407(d)(3)(E)(ii) the Administrator has fully approved the applicable implementation plan for the area under section 7410(k) of this title.

<sup>140</sup> *Sierra Club*, 793 F.3d at 669.

<sup>141</sup> *Id.* at 670.

<sup>142</sup> The type of language the court is referring to is the language used in Subpart 1 and Subpart 2 of Part D which is part of § 7407(d)(3)(E)(v).

<sup>143</sup> *Sierra Club*, 793 F.3d at 670.

<sup>144</sup> *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J. dissenting).

<sup>145</sup> Sydney Foster, *Should Courts Give Stare Decisis Effect To Statutory Interpretation Methodology?*, 96 GEO. L.J. 1863, 1901-02 (2008).

*erra Club*, it is important to explore the two differing statutes at issue.

In *Wall*, the pollutant in question was ozone pollution.<sup>146</sup> As mentioned above, ozone pollution has “additional provisions” under Subpart 2. It was the precise language in §7511a(b)(2) that the court found unambiguous.<sup>147</sup> However, *Sierra Club* should not have involved consideration of Subpart 2, for the pollutant in question was fine particle matter (PM<sub>2.5</sub>).<sup>148</sup> The Court glazed over the EPA’s argument that *Wall*’s unambiguous language was in a different subpart (Subpart 2) by claiming Subpart 1 used the same “type of language” as Subpart 2.<sup>149</sup> In order to test their interpretation that the two subparts have the same “type of language” it is critical to evaluate the text of both Subpart 1 and Subpart 2. Subpart 1 requires the following:

Such plan provisions shall provide for the implementation of all reasonably available control measures as expeditiously as practicable (including such reductions in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology) and shall provide for attainment of the national primary ambient air quality standards.<sup>150</sup>

Meanwhile, Subpart 2 states:

(2) Reasonably available control technology

The State shall submit a revision to the applicable implementation plan to include provisions to require the implementation of reasonably available control technology under section 7502(c)(1) of this title with respect to each of the following:

(A) Each category of VOC sources in the area covered by a CTG document issued by the Administrator between November 15, 1990, and the date of attainment.

(B) All VOC sources in the area covered by any CTG issued before November 15, 1990.

(C) All other major stationary sources of VOCs that are located in the area.

Each revision described in subparagraph (A) shall be submitted within the period set forth by the Administrator in issuing the relevant CTG document. The revisions with respect to sources described in subparagraphs (B) and (C) shall be submitted by 2 years after November 15, 1990, and shall provide for the implementation of the required measures as expeditiously as practicable but no later than May 31, 1995.<sup>151</sup>

There are a number of differences between Subpart 1 and Subpart 2, which indicate that the two should not share the same statutory interpretation. First, the title of the two subpart, Subpart 1 is titled “Nonattainment Areas in General”<sup>152</sup> and Subpart 2 is titled “Additional Provisions for Ozone Nonattainment Areas.”<sup>153</sup> Their headings indicate that the requirements in Subpart 2 are further

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<sup>146</sup> *Wall*, 265 F.3d at 432.

<sup>147</sup> *Id.* at 440.

<sup>148</sup> *Sierra Club*, 793 F.3d at 660.

<sup>149</sup> *Id.* at 670.

<sup>150</sup> 42 U.S.C. § 7502(c)(1).

<sup>151</sup> *Id.* at § 7511a(b)(2)(A)-(C).

<sup>152</sup> 42 U.S.C. Ch. 85, Subch. I, Pt. D, Subpt. 1.

<sup>153</sup> *Id.* at Subpt. 2.



requirements placed on ozone pollution nonattainment areas and an intent of Congress to further separate the requirements of ozone pollution from those of fine particulate matter.

Second, the legislative history of the two subparts indicates a separate intent by Congress, which is another reason to interpret the two subparts differently. Subpart 1 was a product of the 1977 Amendments to the CAA,<sup>154</sup> established to provide additional regulatory provisions in order to achieve and maintain ambient air quality standards for all listed pollutants.<sup>155</sup> Additionally, the 1977 Amendments set deadlines for attainment of the NAAQS.<sup>156</sup> In 1989, two years after the established deadline to achieve ozone NAAQS, Congress discovered that 150 million people were living in an area that was in non-attainment.<sup>157</sup> Congress amended the CAA in 1990, creating Subpart 2 in order to address the noncompliance of ozone pollution<sup>158</sup> by promulgating more stringent control requirements.<sup>159</sup>

The 1990 addition of Subpart 2, which was geared toward ozone nonattainment, is a clear indication that Congress was seeking a different standard to be applied to ozone than the requirements under Subpart 1. The Sixth Circuit's interpretation of Subpart 1 to be interpreted same as Subpart 2 would completely nullify the need for Subpart 2. Additionally, Congress's goal in reaching attainment for ozone would be undermined by saying that Subparts 1 and 2 have the same congressional intent.

If §7502(c)(1) (the provision under Subpart 1) imposes the same requirement as §7511a(c)(2) (the provision under Subpart 2), Congress would not have needed to add the provision under Subpart 2. If Congress had intended the requirements to be equally applied, they could have simply cross-referenced Subpart 1 as the standard for ozone pollution nonattainment. Subpart 2 does in fact reference Subpart 1, but not to show that the two are synonymous. Instead, it is a reference to where RACT is initially mentioned in the statute in order to provide clarity of the RACT requirement for specific sources of ozone pollutions.<sup>160</sup> Furthermore, the EPA does not refute the fact that Subpart 2 is unambiguously a clear requirement for redesignation for ozone pollution; it is Subpart 1 that is applicable in *Sierra Club*.<sup>161</sup>

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<sup>154</sup> Arnold W. Reitze, Jr., *Air Quality Protection Using State Implementation Plans—Thirty-Seven Years Of Increasing Complexity*, 15 VILL. ENVTL. L.J. 209, 221 (2004).

<sup>155</sup> BELDEN, *supra* note 2, at 32.

<sup>156</sup> *Id.* at 7.

<sup>157</sup> S. Rep. No. 101-228, at 3397 (1989).

<sup>158</sup> BELDEN, *supra* note 2, at 35.

<sup>159</sup> *Id.* at 8.

<sup>160</sup> 42 U.S.C. § 7511a(c)(2)(A)-(C).

<sup>161</sup> Brief for Respondent at 60, *Sierra Club v. EPA*, 793 F.3d 656, 668 (2015) (No. 12-3169, 12-3182, 12-3420).

The third distinction is that Subpart 2 speaks with specificity. Subpart 2 requires States to “submit a revision to the applicable implementation plan” with provisions that include the implementation of RACT.<sup>162</sup> The statute does not end with just a RACT requirement; it identifies specific sources of ozone pollution and their requirement to use RACT.<sup>163</sup> The provision ends with a hard deadline for implementation of May 31, 1995.<sup>164</sup> Subpart 2 specifically mentions an “applicable implementation plan,” which is the exact phrase used in §7407(d)(3)(E)(ii).<sup>165</sup>

Compare the specific language of Subpart 2 with the less specific language of Subpart 1. Subpart 1 does not begin with the strong language “the State shall” as Subpart 2 does.<sup>166</sup> Rather the provision begins “plan provisions shall provide for the implementation” of RACM/RACT.<sup>167</sup> Subpart 1 does not identify the plan in a way that makes it clear that it is referring to the “applicable implementation plan” used in §7407(d)(3)(E)(ii), as Subpart 2 does. The very use of the phrase “applicable implementation plan” in Subpart 2 is a strong indicator that Congress intended this requirement to be applied to the redesignation provision that uses the same exact phrase. However, Subpart 1 simply says “plan revisions,” which gives no indication that this plan is the “applicable” plan mentioned in §7407(d)(3)(E)(ii).

Additionally, the deadline for implementation in Subpart 1 is less specific, which requires the use of RACM, which includes RACT at a minimum, but is a broader category of counter measures<sup>168</sup> “as expeditiously as practicable.”<sup>169</sup> Subpart 2 requires the nonattainment area to have implemented RACT “as expeditiously as practicable but not later than May 31, 1995.”<sup>170</sup> The area in question in *Wall* submitted their requests for redesignation in 1999, four years after the deadline in subpart 2 for implementation of RACT.<sup>171</sup> The decision might have been made differently in *Wall* had the area achieved the air quality standards for ozone pollution *before* May 31, 1995, and then sought redesignation. However, the deadline for implementation of RACT/RACM in *Sierra Club* for fine particulate matter was “as expeditiously as practicable.”<sup>172</sup>

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<sup>162</sup> 42 U.S.C. § 7511a(c)(2).

<sup>163</sup> *Id.* at § 7511a(c)(2)(A).

<sup>164</sup> *Id.* at § 7511a(b)(2)(C).

<sup>165</sup> *Id.* at § 7511a(c)(2); *see also id.* at § 7407(d)(3)(E)(ii) (the Administrator has fully approved the applicable implementation plan for the area under 42 U.S.C. § 7410 (1990) of this title).

<sup>166</sup> *Id.* at § 7502(c)(1); *id.* at § 7511a(c)(2).

<sup>167</sup> *Id.* at § 7502(c)(1).

<sup>168</sup> Zacaroli, *supra* note 6, at 49.

<sup>169</sup> 42 U.S.C. § 7502(c)(1).

<sup>170</sup> *Id.* at § 7511a(b)(2)(C).

<sup>171</sup> *Wall*, 265 F.3d at 433.

<sup>172</sup> *Sierra Club*, 793 F.3d at 668 (quoting 42 U.S.C. § 7502(c)(1) (1990)).

Why does the specificity of Subpart 2 matter? It is precisely the specific nature of Subpart 2 that led the *Wall* court to conclude that “it is clear that Congress intended for SIPs submitted for redesignation requests to include ‘provisions to require the implementation of’ RACT measures.”<sup>173</sup> The court refers to Subpart 2 as “establish[ing] additional specific requirements,” while calling Subpart 1 the “basic requirements.”<sup>174</sup> The *Wall* court also acknowledges that “[i]n some cases, the pollutant-specific requirements contained in subparts 2-5 of part D override subpart 1’s general provisions.”<sup>175</sup> What would be the point in having a provision override another provision if they are to be interpreted in the same manner?

To summarize, Subpart 2’s use of the exact phrase “applicable implementation plan,” its requirement of a fixed deadline for implementation, its specific requirement of the implementation of RACT, and its identification of the sources of pollution for which RACT will apply, are all important textual distinctions between the two subparts. The Sixth Circuit, in *Sierra Club*, ignoring these distinctions between Subpart 1 and Subpart 2, found that they had the same “type of language.”<sup>176</sup> But is “shall provide”<sup>177</sup> and “shall submit”<sup>178</sup> enough to indicate Congress’ clear intent? The court in *Wall* did not find that language similar enough to indicate a shared unambiguity; for they found a provision in Subpart 2 requiring a transportation-conformity requirement in the SIP not to be a requirement before redesignation.<sup>179</sup> For *Wall*, what made §7511a(c)(2) of Subpart 2 so unambiguous was the specificity of the provision and its deadlines, which predated any redesignation request.<sup>180</sup> These characteristics are not present in §7502(c)(1) of Subpart 1, the nonattainment provisions for PM<sub>2.5</sub>.

It is important to note that not only did the Sixth Circuit’s *Sierra Club* extend the *Wall* analysis incorrectly by equating Subpart 2 (§7511a(c)(2)) with Subpart 1 (§7502(c)(1)) in relation to the “applicable” requirements in §7407(d)(3)(E)(v), but with next to no analysis attached their unambiguous label of “applicable” to §7407(d)(3)(E)(ii).<sup>181</sup> Once again, *Wall* cannot be a reasonable justification for this. *Wall* found “applicable” used in

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<sup>173</sup> *Wall*, 265 F.3d at 440.

<sup>174</sup> *Id.* at 431.

<sup>175</sup> *Id.* (citing State Implementation Plans; General Preamble for Implementation of Title I of the Clean Air Act Amendments of 1990, 57 Fed. Reg. 13501 (Apr. 16, 1992) (to be codified at 40 C.F.R. pt. 52)).

<sup>176</sup> *Sierra Club*, 793 F.3d at 670.

<sup>177</sup> 42 U.S.C. § 7502(c)(1).

<sup>178</sup> *Id.* at § 7511a(c)(2).

<sup>179</sup> *Wall*, 265 F.3d at 440; *See* 42 U.S.C. § 7506(c)(1) (2012).

<sup>180</sup> *Wall*, 265 F.3d at 440.

<sup>181</sup> *Sierra Club*, 793 F.3d at 669.

§7407(d)(3)(E)(v) to be ambiguous,<sup>182</sup> except for in its requirement of RACT for moderate ozone pollution (§7511a(c)(2) or Subpart 2).<sup>183</sup> As addressed above, *Sierra Club* was about PM<sub>2.5</sub> and not ozone. Using the wrong statute, the Sixth Circuit decided §7407(d)(3)(E)(v) was unambiguous, and therefore decided that §7407(d)(3)(E)(ii) was unambiguous as well.<sup>184</sup>

c. The Sixth Circuit departs from other jurisdictions on RACT requirement

The Sixth Circuit, while citing *Wall*, held that the CAA “unambiguously requires RACT in the area’s SIP as a prerequisite to redesignation...”.<sup>185</sup> In doing so, it rejects the EPA’s claim that a requirement is only “applicable” if it is necessary to attain the ambient air quality standard for PM<sub>2.5</sub>.<sup>186</sup> The rejection of the EPA’s interpretation of RACT requirement is in direct opposition to three other circuit courts.

In *Sierra Club v. EPA*, a case dealing with RACM requirements for ozone pollution, the Fifth Circuit found that “only those measures that would advance the attainment date” are required in the SIP.<sup>187</sup> The Fifth Circuit agreed with the EPA’s interpretation that §7502(c)(1), the portion mentioned in the previous subsection, only imposes a requirement to implement RACM that contributes to attainment as being practicable.<sup>188</sup> They not only agreed with the EPA’s interpretation but they concluded that Congress intended to preserve the EPA’s interpretation regarding RACM with their subsequent amendments to the CAA.<sup>189</sup> While the Sixth Circuit found a rigid requirement to implement control technology even if the area had achieved the NAAQS, the Fifth Circuit allowed the EPA discretion, taking into consideration the administrative burden and high costs of implementing controls, in determining the necessary control requirements.<sup>190</sup> The flexibility that the Fifth Circuit sees the CAA giving the EPA is not present in the Sixth Circuit’s opinion.

In *Ober v. Whitman*, the Ninth Circuit held that the EPA had the discretion, under the 1990 amendments to the CAA, to make exemptions to control requirements by considering the attainment deadlines.<sup>191</sup> The case before the Ninth Circuit involved de minimis sources of PM<sub>10</sub> pollution that, whether

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<sup>182</sup> *Wall*, 265 F.3d at 438.

<sup>183</sup> *Id.* at 440.

<sup>184</sup> *Sierra Club*, 793 F.3d at 669.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Sierra Club v. EPA*, 314 F.3d 735, 744 (5th Cir. 2002).

<sup>188</sup> *Id.* at 743.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 744.

<sup>191</sup> *Ober v. Whitman*, 243 F.3d 1190, 1198 (9th Cir. 2001).

controlled or not, would have no effect on attainment in the implementation plan.<sup>192</sup> The court found that it would be “reasonable to decline to control the de minimis sources of pollution.”<sup>193</sup> While this case is not analogous to the Sixth Circuit case, in that the area in question has not achieved the ambient air quality standards, it does illustrate the willingness of a circuit court to allow the EPA discretion in determining the need to implement certain control requirements. Additionally, it highlights that the aim of any control requirement is the achievement of the NAAQS for a particular pollutant and that the EPA has leeway to suspend requirements that do not interfere with achieving the attainment goals.<sup>194</sup>

In 2002, the D.C. Circuit Court, in *Sierra Club v. EPA*, reached the opposite conclusion that the Sixth Circuit reached pertaining to the rigid RACT/RACM requirement for an area in nonattainment. The D.C. case involved the nonattainment of ozone pollution and the EPA’s decision that the “reasonably available” portion of RACM only applies to measures that would advance the attainment date.<sup>195</sup> The court rejected the Sierra Club’s claim that RACM was required, regardless of whether it would advance the date of attainment or not, by the text and purpose of the Clean Air Act.<sup>196</sup> Unlike the Sixth Circuit, which found the intent of Congress clear in requiring control measures, the D.C. Circuit found the statute ambiguous.<sup>197</sup> In analyzing the EPA’s claim, it found that “the Act, on its face, neither elaborates upon which control measures shall be deemed ‘reasonably available,’ nor compels a state to consider whether any measure is ‘reasonably available’ without regard to whether it would expedite attainment.”<sup>198</sup> Furthermore, the court found that “reasonably available” was intended by Congress to grant discretion to the EPA in determining which control measures must be implemented to achieve the NAAQS.<sup>199</sup>

Once again, this case is not like the Sixth Circuit case, in that the area in the D.C. Circuit case was not achieving the NAAQS requirements. Despite not meeting the NAAQS, the court still deferred to the EPA on ignoring control measures that would not advance the area’s achievement of the NAAQS. Meanwhile, the Sixth Circuit requires the use of control measures even though the area in question had achieved the NAAQS for the pollutant in question.<sup>200</sup>

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<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Sierra Club v. EPA*, 294 F.3d 155, 162 (D.C. Cir. 2002).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

More recently, the D.C. Circuit has strengthened their view that the Clean Air Act is ambiguous in its requirement of reasonably available control technology/measures. In *NRDC v. EPA*, the D.C. Circuit found that “[w]hen control technology is necessary to advance attainment, it is ‘reasonably available’ under the definition and would be required under the rule.”<sup>201</sup> In stark contrast to the Sixth Circuit, the D.C. Circuit determined that if an area was already achieving air quality standards as expeditiously as possible, and implementing control technologies would not speed up the ability to achieve the air quality standards, then no control technologies are reasonably available.<sup>202</sup> As stated above regarding the other cases, this case pertains to an area that is not currently meeting the air quality standards.

To summarize, circuit courts in the progressive West, Deep South, Rust Belt, and Beltway all agree that if RACT/RACM do not further the attainment goals for a pollutant, then it is not reasonably available and the EPA has discretion in deciding to forgo those requirements placed on the state. Additionally, they all agree that the Clean Air Act is ambiguous in terms of the requirement for RACT/RACM. It is puzzling that these diverse courts would defer to the EPA on whether or not to implement RACT/RACM that do not hasten the advancement of attainment in states not achieving the NAAQS, while the Sixth Circuit would find that the CAA unambiguously requires the use of RACT even if the state is achieving attainment.

In the Sixth Circuit’s original opinion, before being superseded by an en banc opinion, the court noted in a footnote that “[i]t may be the case that we will defer, as our sister circuits have done, to a view that individual measures are not RACM/RACT if they do not meaningfully advance the date of attainment, but we leave that for another day.”<sup>203</sup> The ‘another day’ came a few months later when the en banc decision completely removed the footnote. While the above decisions did not pertain to redesignation requests, the logic set forth in them should easily apply. If RACT/RACM can be suspended at the discretion of the EPA if they do not contribute to advance the attainment date, how much more should they not be required when attainment has already been achieved?

d. The Seventh Circuit is correct; “applicable” is ambiguous

The Seventh Circuit ignores many of the technical quibbles between the Sierra Club and the EPA and boils the question down to “[i]s an “applicable” plan the same as the area’s pre-attainment plan (as the Sierra Club contends),

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<sup>201</sup> *Nat. Res. Def. Council v. EPA*, 571 F.3d 1245, 1253 (D.C. Cir. 2009).

<sup>202</sup> *Id.*

<sup>203</sup> *Sierra Club v. EPA*, 781 F.3d 299, 313 (6th Cir. 2015).

or is it limited to those measures that have proved to be necessary to achieve compliance (the EPA's view)?<sup>204</sup> Unlike in the Sixth Circuit cases, there is not a dispute about RACT measures and the ambiguousness of part D's subparts. This case has to do with the requirements for ozone nonattainment among the different classifications of nonattainment, moderate nonattainment and serious nonattainment.<sup>205</sup> The difference between moderate and serious nonattainment determines the extra steps source emitters must take to reduce their emissions.<sup>206</sup>

The court determines which requirements are "applicable" under §7407(d)(3)(E)(ii).<sup>207</sup> Is the "applicable implementation plan" one that includes all of the requirements that should have been implemented when attainment was achieved (serious nonattainment requirements), or is it what was being implemented that led to the achievement of the NAAQS? The Seventh Circuit Court, acknowledging *Wall*, found no basis for the court to make the choice between the two options.<sup>208</sup>

The court, seeing no definition within the statute, found the *Chevron* level of analysis was appropriate.<sup>209</sup> Under *Chevron*, courts review the agency's interpretation of a statute by asking whether the intent of Congress is clear.<sup>210</sup> If Congress has not unambiguously spoken on this precise question, the courts will ask, is the agency's interpretation of the statute a permissible one?<sup>211</sup>

The Seventh Circuit, looking at the language of §7407(d)(3)(E)(ii), found the wording used by Congress a "curiously indirect way" of requiring more onerous than necessary plans.<sup>212</sup> The court correctly notes that if Congress had intended a rigid requirement for redesignation, they could have written the statute in a more direct way.<sup>213</sup> Furthermore, they point out that the very word "'applicable' implies that there may be differences between the contents of the pre-attainment plan and those required for the post-attainment period."<sup>214</sup>

The difficulty in establishing whether or not a statute is ambiguous is that

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<sup>204</sup> *Sierra Club*, 375 F.3d at 540.

<sup>205</sup> *Id.* at 541. Under the 1990 amendments, ozone nonattainment areas were broken down into five categories: marginal, moderate, serious, severe, and extreme. *See* BELDEN, *supra* note 2, at 35.

<sup>206</sup> *Sierra Club*, 375 F.3d at 541.

<sup>207</sup> *Id.* at 540.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.* at 541.

<sup>210</sup> *Chevron*, 467 U.S. at 842-43.

<sup>211</sup> *Id.* at 843.

<sup>212</sup> *Sierra Club*, 375 F.3d at 541.

<sup>213</sup> *Id.* ("Why didn't the statute say: 'the Administrator has determined that the area will continue to abide by the implementation plan that was, or should have been, in place'?").

<sup>214</sup> *Id.*

there is no clear standard;<sup>215</sup> yet the determination that a statute is ambiguous is vital to whether or not the court will defer to the agency's interpretation of the statute.<sup>216</sup> Some have argued that there is a growing shift away from *Chevron* deference and an increase in limiting the EPA's authority.<sup>217</sup> It is important to explore recent court decisions in which the courts have found language used by Congress unambiguous. In recent years, the D.C. Circuit has found "daily,"<sup>218</sup> "any,"<sup>219</sup> and "achievable"<sup>220</sup> to be unambiguous.<sup>221</sup>

The phrase in dispute in both the Sixth Circuit and Seventh Circuit's *Sierra Club* is 7407(d)(3)(E)(ii)'s "applicable implementation plan." "Applicable," unlike "daily," "any," or "achievable" is ambiguous. Even *Wall*, the case used by the Sixth Circuit in denying *Chevron* deference for this statute, says that although "[a]pplicable" could be interpreted as limiting only the geographical area to which the statutory requirements apply, it can also be interpreted as limiting the number of actual requirements...<sup>222</sup> The word "applicable," as the Seventh Circuit points out, is a versatile word lacking in any one definition.<sup>223</sup> To find an "unambiguously expressed intent" by Congress in using this word would defy logic.

Perhaps, the best case to examine when deciding if a statute is ambiguous or not is *Chevron* itself. The phrase in the CAA that was under the Supreme

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<sup>215</sup> Brian G. Slocum, Note, *The Importance of Being Ambiguous: Substantive Canons, Stare Decisis, and the Central Role of Ambiguity Determinations in the Administrative State*, 69 MD. L. REV. 791, 794 (2010).

<sup>216</sup> *Chevron*, 467 U.S. at 843-44.

<sup>217</sup> Erin Murphy, Note, *The Clean Air Act: The End of A Chevron Era?* 5 KY. J. EQUINE AGRIC. & NAT. RESOURCES L. 331, 348 (2012-2013).

<sup>218</sup> *Friends of the Earth, Inc. v. EPA*, 446 F.3d 140, 142 (D.C. Cir. 2006) ("This case poses the question whether the word 'daily,' as used in the Clean Water Act, is sufficiently pliant to mean a measure other than daily .... Daily means daily, nothing else.").

<sup>219</sup> *New York v. EPA*, 443 F.3d 880, 889 (D.C. Cir. 2006) ("No such further definition of 'physical change' is required because Congress's use of the word 'any' indicates the intent to cover all of the ordinary meanings of the phrase . . .").

<sup>220</sup> *Cement Kiln Recycling Coal. v. EPA*, 255 F.3d 855, 861 (D.C. Cir. 2001) ("Section 7412(d)(3) provides that 'the maximum degree of reduction in emissions that is deemed achievable . . . shall not be less stringent than' the best-performing sources 'achieve[]' . . . limits the scope of the word 'achievable' in section 7412(d)(2) . . . EPA may not deviate from section 7412(d)(3)'s requirement that floors reflect what the best performers actually achieve . . .").

<sup>221</sup> See generally Susannah Landes Foster, Note, *When Clarity Means Ambiguity: An Examination Of Statutory Interpretation At The Environmental Protection Agency*, 96 GEO. L.J. 1347, 1351-58 (2008) (exploring the D.C. Circuit Court of Appeals' pursuit to define daily, any, and achievable).

<sup>222</sup> *Wall*, 265 F.3d at 439.

<sup>223</sup> *Sierra Club*, 375 F.3d at 541 ("'Applicable' is a protean word that takes color from context; it lacks a single, enduring meaning.") The court uses the term "protean" which is defined as "tending to be able to change frequently or easily." *Protean*, MERRIAMWEBSTER.COM, <http://www.merriam-webster.com/protean> (last visited Aug. 26, 2016).



Court's review was "stationary source."<sup>224</sup> The respondent in *Chevron* tried to argue that because "stationary source" was defined in another part of the CAA, the Court should adopt that definition for the portion of the statute under review.<sup>225</sup> However, the Court found that the "parsing of general terms in the text of a statute" does not reveal the clear intent of Congress.<sup>226</sup> Additionally, they note that "the terms are overlapping and the language is not precisely directed to the question of the applicability of a given term in the context of a larger operation."<sup>227</sup> This argument is echoed in the Seventh Circuit's interpretation of "applicable" lacking any clear, singular meaning.<sup>228</sup>

e. Applying *Chevron*

As mentioned previously, *Chevron* requires the court to address two questions: did Congress speak unambiguously on that precise question, and if not, is the agency's interpretation of the statute a permissible one?<sup>229</sup> For the reasons mentioned in the previous sections, it is clear that the Sixth Circuit incorrectly found an unambiguous congressional intent in a statute which has no clearly defined meaning.

Since §7407(d)(3)(E)(ii), the statute in question in both circuits' *Sierra Club v. EPA*, is ambiguous, the second question in the *Chevron* analysis needs to be addressed: is the agency's interpretation based on a permissible construction of the statute?<sup>230</sup> The EPA's interpretation of §7407(d)(3)(E)(ii) is that "applicable implementation plan" is the components of the SIP that were needed to achieve the attainment of the NAAQS.<sup>231</sup> Is this a permissible construction?

The CAA states "[a] primary goal of this chapter is to encourage or otherwise promote *reasonable* Federal, State, and local governmental actions, consistent with the provisions of this chapter, for pollution prevention."<sup>232</sup> The EPA's interpretation promotes this reasonable cooperation between the federal and state governments. If the states were required to implement more costly measures even after meeting NAAQS requirements, this would hardly give them an incentive to come within compliance.<sup>233</sup> As the Seventh Circuit opined,

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<sup>224</sup> *Chevron*, 467 U.S. at 840.

<sup>225</sup> *Id.* at 860.

<sup>226</sup> *Id.* at 861.

<sup>227</sup> *Id.* at 862.

<sup>228</sup> *Sierra Club*, 375 F.3d at 541.

<sup>229</sup> *Chevron*, 467 U.S. at 842-43.

<sup>230</sup> *Id.* at 843.

<sup>231</sup> Brief for Respondent at 55, *Sierra Club v. EPA*, 793 F.3d 537 (2015) (Nos. 12-3169, 12-3182, 12-3420).

<sup>232</sup> 42 U.S.C. § 7401(c).

<sup>233</sup> *Sierra Club*, 375 F.3d at 541.

“the residents and businesses of St. Louis must take the same costly steps that would be required had the area been less successful.”<sup>234</sup> In a Senate Report written before the passage of the 1990 amendments, the Senate noted that “[b]ecause States have limited resources and many additional responsibilities, both the State and Federal Government should work together to ensure the implementation of programs that improve air quality.”<sup>235</sup> This illustrates the intent that the CAA be a collaborative effort between state and federal governments, as well as Congress’ respect for the limited resources the states have in tackling air pollution. To punitively require a state to implement more stringent controls even after they have met the air quality standards is at odds with this statement by the Senate.

At the core of the CAA is a “federalism-focused” regulatory scheme, with the primary responsibility of achieving control of air pollution resting with the states and local governments.<sup>236</sup> The regulatory structure established under the CAA was based on attaining air quality standards using SIPs to meet these standards.<sup>237</sup> For states that do not meet these standards, their SIPs must implement all reasonably available control measures, which include RACT as expeditiously as practicable.<sup>238</sup> What happens when the state meets the NAAQS requirements before RACT is implemented? It is a permissible construction given the goals of the CAA to interpret “applicable implementation plan” to mean the components of the plan responsible for bringing the area in compliance with the NAAQS. This satisfies the second prong of the *Chevron* analysis.

## CONCLUSION

The CAA has a long history of revisions and amendments, which makes it “extremely complex and multifaceted.”<sup>239</sup> The states and federal government’s implementation of this complex Act has resulted in extensive review by the federal courts.<sup>240</sup> Therefore, it is not surprising that two circuit courts would differ on the meaning of a particular portion of the Act.

The Sixth Circuit’s finding that the express language of Congress is clear

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<sup>234</sup> *Id.*

<sup>235</sup> S. Rep. No. 101-228, at 3389 (1989).

<sup>236</sup> *EPA v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1617 (2014) (Scalia, J., dissenting).

<sup>237</sup> Ayres, *supra* note 44, at 13.

<sup>238</sup> 42 U.S.C. § 7502(c)(1); as mentioned previously, the court and the EPA agree that under § 7511a(c)(2), the provision for moderate ozone nonattainment, RACT is required in the SIP before redesignation can occur.

<sup>239</sup> Joseph R. Dancy, *The Impact of the Clean Air Act’s Ozone Non-Attainment Areas on Texas: Major Problems and Suggested Solutions*, 47 S.M.U. L. REV. 451, 454 (1994).

<sup>240</sup> Murphy, *supra* note 217, at 334.

pertaining to the “applicable implementation plan”<sup>241</sup> cannot be supported by a plain reading of the statute. The court offers no rationale for why §7407(d)(3)(E)(ii) is unambiguous, other than to cite an unambiguously written provision<sup>242</sup> that is not under review in the case that is before it. They misinterpret *Wall* in closing the door on giving deference to the EPA in determining which “applicable” requirements are necessary for redesignation.<sup>243</sup> They do this despite *Wall*’s decision that “applicable” is ambiguous when deciding the requirements for redesignation.<sup>244</sup> Additionally, in determining that RACT is a requirement necessary for attainment, is in direct contrast to the Fifth, Seventh, Ninth, and D.C. Circuits.

The Seventh Circuit properly concluded that the “applicable implementation plan” is ambiguous.<sup>245</sup> They found both the Sierra Club (“applicable” meaning what the SIP should have implemented at the time of attainment) and the EPA (“applicable” meaning the requirements that led to compliance) have “conceivable understandings of the law.”<sup>246</sup> The EPA’s definition, which received the *Chevron* deference, is permissible because it is in keeping with the goals of the CAA to create a reasonable cooperation among the federal and state governments in achieving air quality.

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<sup>241</sup> Sierra Club, 793 F.3d at 669.

<sup>242</sup> 42 U.S.C. § 7511a(c)(2).

<sup>243</sup> Sierra Club, 793 F.3d at 669.

<sup>244</sup> *Wall*, 265 F.3d at 439.

<sup>245</sup> Sierra Club, 375 F.3d at 541.

<sup>246</sup> *Id.*